



**IN THE MATTER OF AN APPEAL TO  
THE FIRST-TIER TRIBUNAL (INFORMATION RIGHTS)**

**EA/2010/0146**

**BETWEEN:**

**ALAN ARKISON**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**Respondent**

**and**

**THE OFFICE OF FAIR TRADING**

**Second Respondent**

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**DECISION OF THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS)**

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Hearing by: Claire Taylor, Tribunal Judge  
Richard Enderby, Tribunal Member  
Paul Taylor, Tribunal Member

On: 15 March 2011  
At: Field House, London  
Date of Decision: 29 September 2011

**Subject Matter**

**Freedom of Information Act 2000: S1 - Whether Information Held**

**Decision of the Tribunal**

The Appeal is dismissed.

## REASONS FOR DECISION

### Background

1. The Trading Standards Institute (“TSI”) is a professional body with members from both the public and private sector.
2. In the past, TSI has organised an awards ceremony as part of its National Consumer Week. In 2007, one of these awards, for Consumer Journalist of the Year, went to a journalist who had written an article about the Appellant, the contents of which he had refuted and complained about.
3. The Office of Fair Trading (the “OFT”) supported the awards, providing funds and the use of its offices for the judging and ceremony.
4. Consumer Direct is a consumer advice service funded by the OFT.

### The Information Request

5. On 23 March 2008, the Appellant requested from the OFT a copy of the portfolio considered by the judging panel in the Consumer Journalist of the Year Award for 2007. He also asked for any notes made by the senior officer (Ms Cryne) of the OFT, in deciding this particular award. On 10 April 2008, he asked for the statement supporting the nomination of the winning journalist. These requests are the subject of this appeal.
6. On 31 March, Ms Chilvers who was head of marketing for the OFT gave an initial response that:
  - a. *“The competition was run by the Trading Standards Institute, although Christine Wade, Christine Cryne and I were part of the judging panel. Therefore disclosure of this information is not our decision.”*
7. On 3 April 2008, Ms Cryne emailed Mr Arkison stating:
  - a. *“I can confirm that none of us involved with the judging... kept any paperwork relating to it. All material was taken away by the TSI. However, I do not know whether it was kept after the meeting.”*
8. The Appellant made further related requests in a number of letters and emails, and the OFT provided replies. On 6 May 2008, the OFT’s Internal Review Coordinator gave a more formal reply dealing with the various requests. She apologised for her delayed reply explaining that she had been on holiday. She stated that the OFT did not hold the requested information that is the subject matter of this appeal.
9. The OFT’s decision was upheld by an internal review on 12 September 2008.

### The Decision Notice

10. On 27 July 2010, the Respondent issued Decision Notice FS50202111, in which he concluded that the OFT did not hold the requested information, and that no steps were required to be taken.
11. In forming this decision he considered that:
  - a. The OFT had stated that the requested portfolio and nomination statement which had been considered by the judging panel for the Awards were collected and held by the TSI in November 2007 and ceased to be held by the OFT judges. For this reason it had not been necessary for them to search for the information that had been requested by the Appellant.

- b. He was not persuaded by the Appellant's view that the OFT did hold the requested information merely because it had given some material assistance and lent its name to the Awards.
- c. On the balance of probabilities, there was nothing that proved the information was held.

### **The Appeal to the Tribunal**

- 12. The Appellant appealed to this Tribunal by Notice dated 10 August 2010. The Tribunal joined the OFT as a party.
- 13. The Tribunal has had the benefit of written and oral testimony from the Second Respondent's witness; submissions from the parties; and the bundles of documents and authorities submitted by the parties. We have considered all of this material, even if not specifically referred to below.
- 14. Because of the location of the Appellant and his representative, the hearing was conducted in London with a video link to the IAC Glasgow, on 15 March 2011. With the permission of the Tribunal, the Commissioner did not attend the hearing and instead lodged written submissions.

### **The Parties' Submissions and Evidence**

#### **Appellant**

#### Grounds of Appeal

- 15. The Appellant's grounds for disputing the Commissioner's decision is that the Commissioner erred in concluding, on the balance of probabilities, that the OFT did not hold the requested information because:
  - a) the information was (physically) held by the OFT at the time of the request; and/or
  - b) the information was held by the TSI on behalf of the OFT at the time of the request.

#### Evidence

- 16. The Appellant gave a witness statement early in proceedings. However, once it was accepted that the panel's remit was limited to that set out in the FOIA, the Appellant graciously withdrew the statement.
- 17. The evidence included:
  - a. An email of 28 March 2008 at 12:32, from the TSI to, amongst others, Ms Cryne and Ms Wade, that requested they not respond directly to letters from the Appellant:

”

This is to advise you that you may well get a letter from Mr Arkison complaining about certain actions of Andrew Moynihan and other members of staff from North Ayrshire Trading Standards and their involvement with Mr Arkison's failure to carry out building repairs. This matter has been the subject of local newspaper publicity in North Ayrshire but I would ask you to treat any contact from Mr Arkison and his allegations in confidence for now.

Bryan, Nigel and Ron have already received letters following Mr A's original letter of complaint to me as Hon Sec of TSI. Mr Arkison says that he has also written to Christine Wade (perhaps you got it before you left OFT Christine?) and Christine Cryne (I assume that these latter two letters are because of your involvement in the TSI media award selections?). I'm not sure how or where he is getting names and contact information from other than the obvious ones on our websites (Bryan and Ron). He may well be mailing more of you in the future.

Can I please ask you not to respond directly to any letter at this stage other than to formally acknowledge it if you wish. I would appreciate a copy of any letters received.

I'm in the process of investigating and assessing whether this is a matter to be brought before the Professional Conduct Committee but am obviously not acting quick enough for Mr Arkison's liking! I have spoken briefly to Andrew Moynihan to make him aware of Mr Arkison's letters and allegations.

”

- b. Ms Cryne's reply to the email (copied in 17(a) above) of 28 March 2008 at 13:00 showing an intention to consult with the TSI regarding a reply to the Appellant:

”

Thank you for this. Yes we have already received such a letter. It mainly is complaining about the TSI Consumer Journalist of the Year. We were just going to go back and say that we couldn't help as the award was not ours.

By copy I am asking Karen to let you have a copy of the letter he has written to me and to consult you re a reply

”

- c. Copy of an email of 28 April 2008 from the TSI to Ms Cryne copied to Ms Chilvers with other TSI recipients blanked out:

“

Subject: RE:Complaint and Letters from Alan Arkison - Confidential

Hello Ali,

I attach my recent letter to Mr Arkison for your information. I don't think this will be a satisfactory response for him so you may well get continued correspondence.

You are the only people I know who have received communications from Mr Arkison. and you are copied in to keep you up to speed.

You will be aware that TSI does not have to respond to Freedom of Information Act requests so I suggest that for TSI colleagues, if you are contacted again, you refer all matters to me. At this stage I have not received any contact from anyone else to do with Mr Arkison's allegations.

”

- d. A press release from Consumer Direct of 12 November 2007. This refers to the TSI being in partnership with Consumer Direct, a division of the OFT:

“

**The Trading Standards Institute (TSI), in partnership with Consumer Direct, today (Monday 12 November 2007) saluted journalists from newspapers, television and radio whose campaigning scoops have exposed scams and rogues.**

...

Christine Cryne, Director of Consumer Direct at the OFT, said:

'The media plays a very important role in championing the rights of consumers and highlighting the work of trading standards.

'Journalists help trading standards professionals to expose malpractice and to get messages across to protect the public. We are delighted to have supported this year's TSI Media Awards to demonstrate how much we value the role that journalists play.'

...

**Consumer Journalist of the Year**

Jane Barrie, Sunday Mail

Nominated by: Andrew Moynihan, North Ayrshire Trading Standards

The judges' said: 'Jane Barrie is the mastermind behind The Judge, the Sunday Mail's long-running pages that campaign on behalf of consumers. Jane scooped a TSI Media Award last year and she has continued to fight on behalf of consumers and, often working closely with Scottish trading standards teams, expose a range of conmen and rogues over the past 12 months. Another journalist in Scotland, Alistair Jamieson, also drew praise from the judges - for the way his new column, Ask The Scotsman, had presented some important educational messages to consumers.'

“

- e. National Consumer Week meeting notes of 8 October 2007 showing Ms Chivers as an attendee.
- f. Lord Chancellor's Code of Practice on the management of records issued under section 46 of the Freedom of Information Act 2000, ("section 46 code") which, for instance, includes:
  - i. *"Records management is important for many ... reasons. Records and information are the lifeblood of any organisation...  
It supports an authority's business and discharge of its functions  
It supports compliance with ... legislation ... It provides institutional memory."*
- g. Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of FOIA Issued under section 45 of the Act, November 2004 ("section 45 code") which, for instance, includes:
  - i. *"There are many circumstances in which requests for information may relate to persons other than the applicant and the authority; ...It is highly recommended that public authorities take appropriate steps to ensure that such third parties, and those who supply public authorities with information, are aware of the public authority's duty to comply with the Freedom of Information Act, and that therefore information will have to be disclosed upon request unless an exemption applies.*
  - ii. *Public authorities should bear clearly in mind their obligations under the Freedom of Information Act when preparing to enter into contracts which may contain terms relating to the disclosure of information by them.*
  - iii. *When entering into contracts with non-public authority contractors, public authorities may be asked to accept confidentiality clauses, for example to the effect that information relating to the terms of the contract, its value and performance will not be disclosed. Public authorities should carefully consider the compatibility of such terms with their obligations under the Act...Similar considerations will apply to the offering or acceptance of confidentiality obligations by public authorities in non-contractual circumstances. There will be circumstances in which such obligations will be an appropriate part of the acquisition of information from third parties and will be protected by the terms of the exemption provisions of the Act. But again, it will be important that both the public authority and the third party are aware of the limits placed by the Act on the enforceability of expectations of confidentiality, and for authorities to ensure that such expectations are created only where to do so is consistent with their obligations under the Act...." (Emphasis added.)*

### Submissions

- 18. The Appellant submitted extremely lengthy skeleton arguments, including the passages below. (We have inserted the headings to organise the arguments).
  - a. Partnership's motive for denying information held:
    - i. *"The TSI and OFT were in partnership to run National Consumer Week which included the Competition. Rogues and crooked traders were to be sought out and exposed for what they were, without benefit of the Courts. Instead the press with help from these two bodies would deal with them; so the partnership could not afford a scandal involving the main prize winner. This was their motive for denying the Appellant the information."*
    - ii. *"In the case before you OFT and TSI did have a common aim and purpose – the protection of their Competition."*

- iii. *“TSI took the lead in dealing with his request. As a general point he asks the Tribunal to accept that this Competition was about publicity. The partnership wished to show how well they had interacted with the Press in “protecting” the public. It was advertising for business by both OFT and TSI. That is very laudable, provided they themselves are beyond reproach and provided any accusations of wrongdoing are sustainable and the information available under FOIA.”*
- iv. *“I submit there was a cover up by OFT when things went wrong and they refused to even consider conducting an enquiry into what had happened because such an enquiry would expose what they as a corporate body had done from the outset of the partnership.*
- v. *Their partners, TSI had by this time circumvented their own published code of professional conduct with the help of Consumer Direct, who were at the time supposed to be replying to the Appellant’s FOIA application and were not. This was more embarrassment.”*

b. Information was held but the OFT moved it:

- i. *“The day after Mrs Cryne received the FOIA application from the Appellant, Chris Armstrong, Honorary Secretary of the TSI (CA) emailed her, not separately as the head of an independent organisation but included with his members... He asked all of the recipients not to respond to the Appellant and to pass any letters to him. There was a clear FOIA request to OFT but within 28 minutes Mrs Cryne had replied to him agreeing to his direction. I submit CA believed OFT still had documents in its possession.” (See para.s 17(a) and (b) above).*
- ii. *“When Mrs Cryne had replied ... she told CA she had just been going to tell the Appellant they could not help as the Award wasn’t ours”. She sent an Email to the Appellant dated 3rd April 2008 ... saying none of the judges kept any paperwork because TSI took it all away. With time to think the story seemed to be changing in emphasis as it was tailored to suit Section 3(2)(a) of the Act.”*
- iii. *“On 12th November 2007 OFT published a report on the Internet entitled “Newsroom” [see para. 17(d) above] about the Awards Ceremony. It contains quotes from the Judges on the merits and achievements of all the winners. If the portfolios and notes were removed on the 7th November, never to be seen again, as claimed, how could they have achieved this? On a balance of probabilities this claim was untrue but I shall refer to it again later.” (At the hearing the Appellant also stated it was clear that the prose for the TSI press release was the same so it was the same author.)*
- iv. *“At his second attempt IC contented himself with asking routine questions about routine procedures and searches by OFT. I hope to show this was futile since there was no chance the documents were still there...”*
- v. *“The internal review dated 12th September... said the portfolios were given to the judges on the day and “it was understood”, removed as soon as the judging was complete. However by 15th June 2010 in a letter from OFT to IC... the position changed considerably to “The portfolio and nomination statement was held in hard copy when it was held by OFT until it was returned to the TSI”.*

(The Tribunal notes the OFT letter to the commissioner during the investigation stated that the requested information was *“held by the OFT until it was returned to the TSI. The OFT does not know if electronic versions of these documents are held by the TSI.”* Mr Fisher’s oral testimony, which we accept, clarified that the statement was intended to explain that the judges received

the portfolios in hard copy, not electronically, and held them at the point of evaluating the nominations.)

- vi. *“That letter also said the documents were not copied to electronic files. Hard copies are usually kept in filing cabinets, cupboards or drawers under a given file number. In this case there was no central reference or record and if Mrs Cryne or Ms Chilvers did have such material their actions were detrimental to any FOIA application. Their credibility is at issue.”*
- vii. *“On 28th April 2008 CA sent an email to Mrs Cryne [paragraph 17(c) above] and included his TSI colleagues in it. Attached was a copy of a letter he had sent to the Appellant dated 22nd April 2008... The only other item in the email was a curiously worded piece of advice to his TSI colleagues advising them they were not subject to FOIA. Why would he need to copy Mrs Cryne into this? It was an internal TSI matter. I submit the reasonable person would think he was making a final check to ensure the cupboard was bare and reminding OFT of the joint line to take under FOIA. They were all too willing to comply.”*
- viii. *“I have shown the Tribunal the extent of the attempts to prevent the Appellant obtaining the documents he originally sought. OFT were to admit in June 2010 that they had held documents relating to the Competition but claimed, on the word of Mrs Cryne and Ms Chilvers that they had been returned to TSI ... I ask the Tribunal to find, on a balance of Probabilities, that they still held them at the time of this application on 23rd March 2008 and it was during the ensuing hiatus that they were passed to TSI – not on conclusion of the judging. I submit TSI were still worried there might still be documents in OFT’s possession, hence their carefully worded email on 28th April 2008.”*

c. *Requested Information should be held for audit purposes:*

- i. *“Neither OFT nor the Commissioner has mentioned the Lord Chancellor’s Code of Practice on the Management of Records made under Section 46 FOIA. At Item iv the importance of keeping records is highlighted. At paragraph 8.1 (d) it states “the need to explain and if necessary justify past actions, in the event of an audit etc. ...or if an applicant complains to the ICO about the handling of an FOI request”. At paragraph 8(4) under the heading of ensuring records are kept it states the necessity to “keep accurate records of their daily work”.*
- ii. *“OFT had spent nearly £23000 of public money and claimed it had no central or control file to show what they had done and why... OFT had no means of checking the actions or claims of Mrs Cryne or MS Chilvers so were in no position to defend them save for their unsupported word.”*
- iii. *“I ask the Tribunal to accept that there was a business need for OFT to keep proper and detailed paperwork to justify their expenditure and to demonstrate their use of the event, with the Awards as the highlight, to promulgate their aims and targets (both their joint ones with TSI and their discrete ones for Consumer Direct alone) and to satisfy the Guidelines [section 46 code].”*

TSI held papers on OFT’s behalf: s.3(2)(b) FOIA: “held by another person on behalf of the authority”:

d. TSI-OFT Partnership:

- i. *“There was no contract or memorandum of understanding to set out the parameters of the partnership agreement with TSI”.*
- ii. *“OFT publicly billed itself as being in partnership with TSI, in its publication “Newsroom” ... for the media awards as part of National Consumer Week, not*

as a verbal and “informal arrangement” as they would later claim in their review of the FOIA request.”

- iii. *“It is usual in government departments to have a written contract or a memorandum of understanding with other departments or outside bodies .... This ensures both sides know what to expect and what the parameters of the agreement are. In this case as it was claimed to be a verbal “informal arrangement...Because it did not suit the partners, or the third party allied to the partnership, to permit the appellant to have the information he sought, OFT are now claiming that how they billed it was not what they meant...”*
- iv. *“In a letter to ICO dated 15th June 2010 ... OFT claimed the whole of National Consumer Week belonged solely to TSI ... and they got the use of OFT’s logo (It does not say what OFT obtained from the deal). This might have been the case for British Gas but is a spurious argument in the case of OFT. Companies sponsor events and good causes for tax and advertising purposes. If you are selling gas and boiler maintenance, sponsorship of TSI is excellent for business. According to OFT the taxpayer got exactly nothing for their investment.”*
- v. *“I invite the Tribunal to accept that I have demonstrated that OFT put far more into the organisation and running of this Competition than they would have us believe...”*
- vi. *“Consumer Direct*
  1. *Funded the event spending nearly £23,000*
  2. *Assisted in advertising the Competitions to receive nominations from Consumer Direct Staff. Ms Chilvers was widely quoted in the nomination process ...*
  3. *Bought the trophies for the winners and had them engraved.*
  4. *Organised the Judging room at OFT headquarters on 7th November 2007 with lunch for seven people (three OFT judges, three TSI judges and an unidentified other).*
  5. *Organised a room at OFT headquarters for the Award Ceremony with a meal...*
  6. *Published the OFT press release on 12th November 2007 giving a public account of the partnership event (Pages 154-157) for their discrete target audience...*
  7. *Mrs Cryne made a speech for Consumer Direct and a Government Minister from BERR, Gareth Thomas MP, made a speech about the cooperation and joint efforts between OFT and TSI in regulating consumer issues, each in its way.”*
- vii. *“If this Competition belonged solely to TSI the reasonable person would have expected that they alone would make a press release advertising the results. Not so, OFT did the same so obviously they had a business need to promulgate the Event also, despite their denials. I ask the Tribunal to find that this action alone proves that OFT had a share in the benefits from the Event for their own business purposes and this alone brings them within the embrace of Section 3(2)(b) no matter where the papers are currently kept.”*
- viii. *“However that does not end the matter. I asserted at the beginning that this was a cover up and I would like to refer to an authority the Commissioner introduced. This is the case of Stuart v IC EA/2008/0040 which at Paragraph 41 quotes from the case of Bromley v IC EA/2008/0033 as follows; the Tribunal was required*



1. *“to consider a number of factors, including the quality of the public authority’s initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere, whose existence or content point to the existence of further information with the public authority, which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”*
- ix. *“May I refer the Tribunal back to the involvement of TSI in this FOIA application at the outset when OFT were in breach of Section 1 of the Act and TSI were involved in deciding what could or could not be given to the Appellant? I suspect there may have been a written contract, from what follows, and TSI were anxious not only that the nomination documents would be denied the Appellant but this contract also.”*
- x. *“...The Competition was the main event and an integral part of that Week. The published report on the Awards carried the logo and proclaimed the partnership...”*
- xi. *“...the General Counsel ... seems to paraphrase the Guidelines in stating that the TSI alone created the portfolio or nomination statement so these remain the property of the TSI. I ask the Tribunal to reject this claim as OFT funded the whole package.”*

19. At the hearing the Appellant’s arguments included:

Cover Up:

- a. There has to be a reasonable suspicion of cover up because OFT did not reply properly to his request for five weeks, whilst in correspondence with the TSI. The witness and other senior officers were included in the reply email of 28 March. (See *para. 17(b) above*). It seems the OFT had been caught on the hop and therefore had to scheme to do something about it. They simply acquiesced to the TSI’s email and handed over to them the paperwork that was the subject of the FOI request. This is because they set out to accuse rogue traders and involve the press, but this is a wild beast which is hard to control. When the OFT received the Appellant’s request they saw there could be major embarrassment for them. It was clear the trader who the winning journalist wrote about disagreed about the truth of the article and this directly affected the competition, bringing the OFT into embarrassment and disrepute as to whether the article was accurate.
- b. The Appellant claimed that the competition had never been run since. It is a very serious thing to write about traders in newspapers in an accusatory way. The OFT’s association with the competition implies they are putting their name to such things. It is therefore important to keep records. The judges’ credibility would be at issue if they hadn’t kept a central record of the portfolio to justify themselves when someone later asks questions.
- c. The OFT did not do the procedural things they should have, for instance as the ICO found in the decision notice and in taking into account the section 45 code and the Cabinet Office guidance. Accordingly, this raises the question as to whether they are telling the truth. In relation to Cabinet Office guidance – there should have been a written Memorandum of Understanding (MOU) if the OFT were sponsoring a body. The Appellant would have expected the contract or MOU to ensure TSI would be accountable to provide information for FOIA purposes. In relation to the section 45 code, the OFT were not allowed to agree with the TSI for the latter not to provide it with information if required under FOIA.

- d. The requested information should have been kept by the OFT because anyone who looked at the press release (see para. 17(d) above) would have been entitled to apply under FOIA to see documents.

## **Respondent**

### Submissions

20. The Commissioner's written submissions included:

#### Information held directly:

- a. The evidence does not support the Appellant's conclusion that "*it is logical that the judges would retain the copies of portfolios they were given, if for no other reason, than that taxpayers' money funded this competition and, in the event of an audit, papers would need to be produced.*" There is no particular justification for the OFT retaining the requested information.
- b. The emails provided as evidence in this appeal do not provide any evidence that TSI believed that the OFT held the requested information or that in any way TSI and OFT colluded to remove the information from the OFT to circumvent the Act. The Commissioner would suggest that that Appellant is looking for a conspiracy that is simply not supported by the evidence.

#### Information held by TSI on behalf of OFT

- c. The Appellant argues that s.3(2)FOIA could be applicable because both the TSI and OFT organised the competition and, as "*the papers had to be retained somewhere*". The evidence does not suggest that TSI and the OFT 'jointly owned' the competition. Mr Fisher's evidence is that the NCW and Media Awards are organised by the TSI, with only limited sponsorship and support provided by the OFT such as allowing the use of the OFT's offices for the Media Awards and judging process.

## **Second Respondent**

### Evidence

21. The TSI press release of 12 September 2007 was referred to:

- a. "*...Local authority Trading Standards Services and Consumer Direct staff are now urged to nominate reporters and media organisations that have helped raise the profile of consumer issues for the 2007 awards...Karen Chilvers, head of marketing for Consumer Direct, said: "We would not be able to get the Consumer Direct message out so widely without such an excellent network of consumer journalists across the country...It seems absolutely right to reward them for their efforts..."*

(We note that it was not clear from the bundle presented to us whose evidence this was. In any event, the evidence has not been disputed.)

22. David Fisher, Director of Consumer Direct of the OFT, gave testimony as follows:

- a. He was the director of the OFT's Trading Standards Partnership Team.
- b. Consumer Direct is a telephone and online consumer advice service offering information and advice on consumer issues. It is funded by the OFT, and delivered in partnership with Local Authority Trading Standards Services. The service is outsourced to suppliers, and individual staff may be employees of local authorities or the private sector.

- c. The TSI is an independent professional membership association, which represents trading standards professionals in local authorities, the business and consumer sectors, as well as in central government.
- d. Having often interacted with the TSI, he has been involved in TSI events and the sifting process of nominees for a TSI consumer award. However, while the OFT sometimes works in partnership with the TSI (just as the OFT works in partnership with many other organisations from time to time), the OFT does not control the TSI and cannot give the TSI instructions.
- e. National Consumer Week<sup>1</sup> was an annual event comprising a series of initiatives to promote awareness about consumer rights and sources of advice. One of these initiatives was the Media Awards. This was an awards ceremony to recognise the journalists who have done most to actively highlight the efforts of Trading Standards officers or Consumer Direct in their work against rogue traders. The ceremony involved a variety of awards, including the award for 'National Consumer Journalist of the Year'. TSI has organised this since 1988. From 2004, the OFT and Consumer Direct contributed sponsorship and other support (such as the use of OFT premises for events), and the Consumer Direct logo is used in connection with NCW activities. From the OFT's perspective, it was a means to raise public awareness of consumer rights and protection issues, and this was a common objective with TSI which explained why they had worked together and why the OFT would have considered it useful to sponsor the competition.

#### Information held by OFT

- f. The 2007 Media Awards were held on 16 November 2007 at the OFT's offices. This was a TSI organised event. The OFT provided some support by funding the purchase of trophies etc., and allowing its premises to be used for holding the awards and for the judging process. Three members of OFT staff were invited to participate in the Media Awards judging panel: Ms Wade, Ms Cryne and Ms Chilvers, two of whom at the time held posts within Consumer Direct. Due to the passage of time, none of the three remain employed by the OFT.
- g. However, the OFT made enquiries following the Appellant's FOIA request and it was confirmed that on 7 November 2007, the panel members had met at the OFT's offices and were provided with portfolios by the TSI on each of the nominated journalists, which contained extracts of articles written by them and supporting 500 word nomination statements. The panel members were left to review the papers, deliberate on their choices for a couple of hours, before reaching their decisions. This was the sum total of what they did. The nomination portfolios were then retained by the TSI. Although not personally involved in this particular judging panel, Mr Fisher stated that he had been involved in a similar panel for TSI organised awards and it was his experience that the procedure described for the 2007 awards followed normal practice.
- h. He elaborated that:
  - i. *"Following Mr Arkison's request for an Internal Review, I understand members of the OFT's General Counsel's Office conducted further enquiries with the staff members concerned. I have discussed this with the lawyer in the OFT's General Counsel's Office who dealt with the internal review, who told me that he had spoken to Christine Cryne and Karen Chilvers who confirmed that the TSI had retained the Disputed Information at the conclusion of the judging process and that it was not held by the OFT. It was also confirmed during these further enquiries that at no point was the Disputed Information ever copied, stored or recorded in any form by the OFT";*

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<sup>1</sup> We note that whilst the witness was not clear on the point, the OFT's representative stated at the hearing that National Consumer Week no longer takes place.

- ii. *"It is not entirely clear to me on what basis Mr Arkison seeks to challenge the truthfulness of the OFT's statements, effectively contending that the OFT and its relevant employees are telling lies."*
- iii. On cross-examination, he stated that there would have been no reason why the judges from the OFT and Consumer Direct would have kept the portfolio after the event. The documents belonged to TSI and he was confident that the judges would not have considered it necessary to question why TSI removed the documents after deliberations, and he could not say whether future requests under FOIA would have been considered as a reason for the judges wanting to keep the information.
- i. He also relied on the initial response to the Appellant on 31 March 2008, the email to the Appellant of 3 April 2008, and the letter of 6 May 2008 as support for this.

Information held by TSI on behalf of OFT

- j. As to whether the information was held on behalf of the OFT, Mr Fisher stated:
  - i. *"...the Media Awards were – and continue to be – organised and administered by the TSI with sponsorship from Consumer Direct. The awards were – and are – given by the TSI and not by Consumer Direct or the OFT. Neither Consumer Direct nor the OFT were involved in determining the rules for the Media Awards' nominations, nor in collating the portfolios with articles and nomination statements provided to the judges for them to assess and select the competition winner. The OFT did not create or control the Disputed Information; we do not hold it; and we have no right of access to it. Accordingly, I do not see how the TSI can be said to be holding the Disputed Information on the OFT's behalf."*

23. On cross-examination, Mr Fisher confirmed that:

- a. There was nothing in writing in relation to the funding and other terms of the relationship between the OFT or Consumer Direct and TSI.
- b. Consumer Direct staff across various centres may have made nominations for the awards.
- c. He could not answer the Appellant's question as to why TSI as an independent privately registered company had what appeared to be a website connected with government.
- d. He did not know whether TSI held the requested information.

Submissions

24. Submissions included:

- a) *"It is unclear... precisely what basis [the Appellant] has for making [the] allegations, which amount, in substance, to an accusation that the OFT and its officials have been telling lies in order deliberately to conceal the portfolio from the Appellant...the OFT vigorously denies the Appellant's allegation of collusion or other impropriety between the OFT and the [Commissioner]."*
- b) *"As the OFT has repeatedly explained to the Appellant the OFT did not hold the portfolio, and it was not and never has been, held on the OFT's behalf. The OFT has transparently explained the reasons why it is entirely unsurprising that that is so, though it has also searched for the information and made enquiries with the OFT staff who were involved in the judging process, whilst they were still employed by the OFT."*

- c) *“Indeed, having regard to the OFT’s limited role in relation to the Awards, and the likelihood that even those members of the judging panel who were OFT employees were (on proper analysis) adjudicating in their personal capacities rather than on the OFT’s behalf, it is likely that the portfolio has never at any time been held by or on behalf of the OFT. However, the Tribunal does not need to decide whether that is so, because all that matters for present purposes is whether the portfolio was held by or on behalf of the OFT at the time of the request.”*
  - d) At the hearing, Mr Bates for the OFT argued that the OFT did not play a part in the article that was written and its only role was in relation to providing an award to the journalist. It was not making a judgment about a particular trader and so would not have needed to keep records in relation to this.
25. He explained that the competition had been going on for some time and had been sponsored by a third party. The OFT had therefore been invited to enter a pre-existing arrangement and this suggested something about the level of control between TSI and any sponsor. It would have been unlikely that the OFT would stipulate that it would want a right to any information held in connection with any competition to be obtainable at any time it wished. In the absence of a contract, the OFT has no way of providing the information to the Appellant.

### **The Task of the Tribunal**

26. The Tribunal’s remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.
27. The burden of proof in this appeal lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the decision made by the OFT and upheld by the Respondent was wrong. In making its decision, we may only consider evidence relevant to the issue before it, of whether the requested information is held.
28. Accordingly, as was made clear at the case management hearing and at the hearing, the Tribunal does not have jurisdiction to decide other matters raised by the Appellant, such as his alleging a ‘cover up’ concerning the Consumer Journalist of the Year Award 2007 competition itself. We also need not address his concerns about the Respondent’s investigation. As an independent judicial body, we have looked into the matter afresh, independently considering the evidence and arguments put to us at the hearing and in writing.

### **The Questions for the Tribunal**

29. The Questions for the Tribunal in this appeal are:
- a. Did the OFT hold the information?
  - b. Does TSI hold information on behalf of OFT?

### **The relevant law**

30. A person who has made a request to a ‘public authority’ for information is, (subject to the provisions of FOIA), entitled to be informed in writing by the public authority whether it holds the information described in the request, and if so to have that information communicated to him. (S.1(1) of FOIA).
31. The term “holds” for these purposes includes information held by someone else, but “on behalf of” the authority. (S.3(2)FOIA).

32. In deciding whether information is “held” by a public authority for the purposes of s.1 FOIA, previous decisions have applied a test, established in *Linda Bromley v Information Commissioner & the Environment Agency* (EA/2006/0072). In that case, the Tribunal observed in paragraph 13:

*“There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. This is particularly the case with a large national organisation ... whose records are inevitably spread across a number of departments in different locations. ... the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal in which the Information Commissioner's findings of fact are reviewed. We think that its application requires us to consider a number of factors including the quality of the public authority's initial analysis of the request, the scope of the search that it decided to make on the basis of that analysis and the rigour and efficiency with which the search was then conducted. Other matters may affect our assessment at each stage, including, for example, the discovery of materials elsewhere whose existence or content point to the existence of further information within the public authority which had not been brought to light. Our task is to decide, on the basis of our review of all of these factors, whether the public authority is likely to be holding relevant information beyond that which has already been disclosed.”* (Emphasis added.)

33. This Tribunal agrees that since it is difficult to establish with certainty whether a large organisation ‘holds’ requested information, the Tribunal needs to decide this ‘*on the balance of probabilities*’. Depending on the circumstances, factors in reaching the decision might logically include the analysis of the request, what searches have been carried out and the rationale for the extent and method of search.

#### **A. Did the OFT hold the information?**

34. We accept:

- a. The relevant judges only ever held the requested information when it was handed to them in hard copy and that this was limited to the few hours in which they sifted through and deliberated upon the award. This would seem to be a perfectly normal way to conduct a sift process and we have been given no real reason to doubt it; and
- b. This was the normal practice for the awards.
- c. The OFT asked the judges to confirm that the portfolios had been handed back to TSI after the deliberations and they did so.

35. Whilst we were told by the OFT’s representative that the OFT conducted a search for the information, we were not given any details to support this. Regardless of this, the facts found above are sufficient to convince us that on the balance of probabilities, the OFT did not hold the information at the time of the request.

36. The Appellant makes various assertions that are unsubstantiated and which we do not accept. These include:

- a. That it can be deduced from the TSI email to the OFT of 28 March 2008 (in para.17(a)), that TSI believed the OFT possessed the requested documents at the time of the request.
- b. TSI colluded with the OFT to ensure the latter got rid of the requested information.  
  
Nothing in the OFT email of 28 March 2008, illustrating its intention to consult with TSI regarding the reply to the Appellant, or the TSI email of 28 April 2008 justifies the Appellant’s suspicions. The section 45 code which the Appellant referred us to envisages that public authorities will consult with interested third parties.
- c. The combination of the communications from the OFT to the Appellant and those between the OFT and TSI, all at around the time of the request, reveal a changing story designed to conceal whether the information was held. (See *para.s 17(a) to (c)*.)

Whilst the initial response of 31 March (that the disclosure of the information was not the OFT's decision) could have been better phrased so as to respond properly to an FOIA request, on the facts, it is highly likely that the OFT meant that the decision was not theirs to make because the information was held by the TSI who had run the competition. We do not think that any of the communications, such as the email of 3 April explaining that none of the judges had kept the papers indicates a change of story. The statement that the awards were from TSI not the OFT supports the OFT judges being required to hand back the material to the TSI after the event.

- d. The arguments proffered in para.19(a) above about the partnership's motive to suppress scandal.

These are baseless and highly unconvincing - we do not accept that if it were proven that a prizewinner within the awards ceremony had published an untruthful article, this would expose the OFT to scandal. We do not accept that the OFT were motivated to suppress scandal and so conspired with TSI to suppress disclosure of the portfolio. We also consider it extremely unlikely that the requested portfolio would contain information revealing ammunition to fuel a scandal.

- e. That the 12 November 2007 press release (in para.17(d) above) could not have been drafted without the OFT having had the requested information in its possession after the competition.

Sight of the portfolio would not have been needed to produce the press release. It does not set out any such a level of detail.

- f. There has to be a reasonable suspicion of cover up because the OFT did not reply properly to his request for five weeks.

The delay does not cause real suspicion, and, in any case, the relevant official who replied on 6 May 2008 explained that she had been on holiday. (See *para.s 8 and 19 above.*)

37. The Appellant argues that the OFT should have kept the requested information as part of its proper records. However, the question before us is what the authority actually held, not what it should have held. Perhaps, if the normative position were so strong it would inform our expectation of what the OFT actually held. However, in this case we do not agree that the OFT had any reason to have kept the requested information. We do not see why it would have been necessary for auditing - the judges of the event were not being audited. For the reasons discussed in paragraph 47 below, we also do not accept any requirement under the section 45 and 46 codes. The idea that the OFT would need to keep for posterity these types of portfolios to ensure the credibility of the judges for any event they sponsor seems far-fetched. We would have expected records for the expenditure (of nearly £23,000) on funding the events and these existed and were disclosed to the Appellant. However, that is something quite different.

38. We do not accept any of the other evidence put to us indicates that the Appellant has successfully challenged the credibility of the OFT officials. Accordingly, on the balance of probabilities, the OFT did not hold the information requested.

## **B. Does TSI hold information on behalf of OFT?**

39. We have not been told whether TSI holds the requested information. If it does not, then we do not need to consider whether the OFT has any form of rights to have the information. Even assuming it does, or did so at the time of the request, we find that there is nothing to indicate that TSI holds any of the information requested on behalf of the OFT or Consumer Direct.

40. We accept and consider as key factors that:

- a. The awards were run by TSI;
- b. Whilst the OFT provided significant sponsorship in the ways set out above, and Consumer Direct nominated candidates for awards, they did so to pursue their joint interests in encouraging and improving awareness in consumer rights and protection.

The press release of 12 November 2007 makes clear: *"We would not be able to get the Consumer Direct message out so widely without such an excellent network of consumer journalists across the country...It seems absolutely right to reward them for their efforts."*

The OFT did not provide sponsorship in order to have rights to require the information within portfolios of candidates for the relevant awards – it is hard to see how these would be helpful to pursuing their broader objectives; and

- c. There is nothing in writing explaining any terms for OFT sponsorship or anything else relevant to our case.
41. As for the nature of the relationship between the two parties, press releases described the TSI as being in partnership with Consumer Direct. Given there was no written contract or Memorandum of Understanding, we suspect this was not a legal arrangement, but a looser description as might be expected in a press release. It is clear that TSI ran the awards and the OFT helped out. This might be called a partnership of sorts, but not one where we would expect TSI to be holding information on behalf of OFT, its sponsor.
42. The emails between the TSI and OFT do not support any argument of TSI being any form of agent of the OFT. TSI on the other hand, did request of the OFT not to reply directly to the Appellant (in para.17(a)), but they did so anyway.
43. That TSI seems to have a government website address does not affect our findings.
44. Clearly, the OFT would be able to request the material, but without written terms addressing the point, we find it hard to envisage that TSI would be required to give it to them. Although we were offered no analysis on the point, even had they been so required if the OFT made a request, this would not necessarily be the same thing as TSI holding the information on behalf of the OFT.
45. We agree with the Appellant that the OFT benefitted from the competition. But it is clear that TSI ran it - and not on behalf of another - and that the requested information, if still held by TSI, belongs to it.
46. We find it somewhat surprising that the OFT had nothing in writing that they could present on the basis on which they provided sponsorship. This is unhelpful to us in our need to ascertain the nature of the relationship. We suspect it is not good practice. However, whilst we find it regrettable, we also find it believable.
47. Whilst the Appellant suggested that given the existence of the section 45 and 46 codes, there was doubt as to whether the OFT were telling the truth, we do not agree. (Presumably by this he meant that he suspected there was indeed something in writing. He expected the contract would state the TSI to be *"accountable to provide information for FOIA purposes"*, and that in relation to the section 45 code, *"the OFT were not allowed to agree with the TSI for the latter not to provide it with information if required under FOIA"*.) As an aside, we note that we do not think the codes are particularly relevant here. To suggest that a public authority need to neurotically collect records of all its interactions with others purely for FOIA stretches our understanding of the codes. The portfolios did not belong to OFT and their collection would not support the discharge of its or Consumer Direct's functions or help the institutional memory in any meaningful way. As for the section 45 code, the OFT have not argued that it would not hand over the information because of TSI's expectation of confidentiality based on some agreement they had for the OFT not to disclose TSI's information. They argue they do not hold the information to disclose it. Further, neither code requires the parties to enter into agreements specifically to ensure that information belonging to TSI should be said to be held on behalf of the OFT.
48. There are no other arguments or evidence that the Appellant has put forward that persuade us in any way of his position on either ground.

## Conclusion

49. The Tribunal concludes that on the available evidence, the Second Respondent did not hold the information within the meaning of FOIA that was requested by the Appellant at the time of the request. This is because the Tribunal is satisfied on the evidence that, the judges from the OFT



and Consumer Direct handed back to TSI the relevant portfolios after having made their deliberations and that if TSI kept the information, it did not do so on behalf of the OFT.

50. The Appeal is dismissed.

51. Our decision is unanimous.

**Other matters**

52. Promulgation of this decision was delayed due to illness. Accordingly, a notification of the outcome of the appeal was given on 19 July. Rights to seek an appeal are effective from 27 September 2011.

**Claire Taylor**

Tribunal Judge

**29 September 2011**